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No. 1122

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In the Supreme Court of the United States

OCTOBER TERM, 1967

JIMMY D. GANDY AND ALBERT J. BERRY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals is reported at 386 F.2d 516.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1967. A petition for rehearing was denied on January 17, 1968. The petition for a writ of certiorari was filed on February 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Berry was prejudiced by the court's appointment of his retained counsel to represent his indigent codefendant.

2. Whether the form of question used by government counsel in cross-examination of character witnesses requires reversal.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of transporting and selling stolen automobiles in interstate commerce in violation of 18 U.S.C. 2312 and 2313 (counts 2-23) and conspiracy to do so (count 1). On August 5, 1966, petitioner Berry was sentenced to imprisonment for three months and fined $1,000 on count one; on the remaining counts he was placed on probation for three years. Petitioner Gandy was sentenced to imprisonment for concurrent two-year terms on all counts. The court of appeals affirmed (Pet. App. A).

The evidence showed that from April to July, 1964, a number of automobiles were rented for a week's duration from agencies in the Miami, Florida, area by Eugene Umanski, Donald Persall, and Doris Popola.[1]

[1] Umanski was indicted in a state court and, following a plea of guilty, served a six-month sentence (R. 28-29). Both Persall and Popola pleaded guilty in Newark, New Jersey, and received two-year sentences, suspended with probation for three years (R. 102, 129).

They had obtained driver's licenses under fictitious names, and they used the licenses as proof of identity when they entered into agreements with the rental agencies (R. 18, 20, 22-23, 68-69, 75, 87-88, 91, 96-97, 109-110, 127-129, 136, 140).[2] Persall and Miss Popola delivered their rented cars to Umanski, who turned them over to petitioner Gandy for a $200 consideration, which Umanski shared with the others (R. 18-23). Umanski himself obtained five rental cars for Gandy, and received $200 per car plus the rental charge, which he retained (R. 22). On several occasions, Umanski helped Gandy remove the rent-a-car decals, serial number plates, and license plates, and affix Alabama plates to the cars (R. 24).

On the day following the delivery of the cars to Gandy, they were placed on a fast boat and shipped to Puerto Rico under a bill of lading secured by petitioner Berry in the name of a corporation which he owned (R. 145-169). Berry sold the cars to individuals or automobile sales agencies in the San Juan area for $300-$400 less than the usual price paid for the particular model of car purchased (R. 178, 206, 221, 224-226).

ARGUMENT

1. Prior to trial, Berry's retained counsel, Joseph P. Manners, was appointed by the court to represent codefendant Gandy, who was indigent. Manners gave no indication that he could not represent both de-

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[2] Citations are to the the record of trial, filed with the clerk of this Court.

fendants. In his opening statement Manners advised the jury that when he objected on behalf of Gandy, they should consider that he represented Gandy, and that when he objected on behalf of Berry, they should recognize that he represented Berry. Counsel told the jury that he would tell them when he was standing up on behalf of both defendants. Throughout the trial no incident arose requiring defense counsel to take a position beneficial to one defendant at the expense of the other. Indeed, all but one of the witnesses who testified for the prosecution knew only one of the defendants. The one exception, Umanski, testified at length regarding his association with Gandy, but only summarily about his one conversation (by telephone) with Berry. No motion for severance was made before or during the trial. Nor was any claim asserted by counsel that any of the government's evidence, while admissible as to one defendant, was inadmissible or prejudicial as against the other defendant whom he represented. Nor was any claim made on appeal to the Fifth Circuit that counsel's representation of both defendants constituted a conflict of interests.

For the first time, in a petition to the court of appeals for rehearing, counsel made the argument which he urges before this Court, that the representation by Mr. Manners of both defendants prejudiced Berry, because counsel could not call upon Gandy to testify on Berry's behalf, since such testimony would not have been in Gandy's best interests.[3] This argu-

[3] We note that neither of the contentions in the petition allege any prejudice to petitioner Gandy.

ment is too belated to be convincing. There is no reason to believe that, if Gandy had been tried separately, or were represented by other counsel, he would have waived his privilege against self-incrimination and chosen to take the stand for his co-defendant. In view of the extent to which Gandy was implicated in the car theft ring by the government's evidence, it is unrealistic to suppose that his counsel would have risked putting Gandy on the witness stand. The very contention in the petition is that it would have been contrary to Gandy's interest for his lawyer to permit him to testify. Nor is there any reason to believe that, if he did testify, Gandy would have exculpated Berry, especially in light of Umanski's testimony tying them together in the stolen car operation. The mere fact of dual representation without any showing of ineffective service to Berry is not ground for reversal. *United States* v. *Cosentino*, 372 F.2d 61 (C.A. 7); *United States* v. *Berriel*, 371 F.2d 587 (C.A. 6); *United States* v. *Paz-Sierra*, 367 F.2d 930, 932-933 (C.A. 2), certiorari denied, 386 U.S. 935; see *Glasser* v. *United States*, 315 U.S. 60, 76; see also *United States* v. *Kahn*, 381 F.2d 824, 841 (C.A. 7), certiorari denied, 389 U.S. 1015; *Gorin* v. *United States*, 313 F.2d 641, 645-646 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Armone*, 363 F.2d 385, 405-406 (C.A. 2), certiorari denied, 385 U.S. 957.

2. After Berry had taken the witness stand, defense counsel called eight character witnesses on his behalf. During the cross-examination of the first one, Philip Cook, the following colloquy occurred (R. 293):

> Q. (By government counsel, Mr. Foosaner): Now, Mr. Cook, have you heard . . .
>
> MR. MANNERS (Defense Counsel): If your Honor please, I object.
>
> MR. FOOSANER: Let me finish my question.
>
> MR. MANNERS: I know what you are leading up to. You have shown it to me. May we have a conference at the bench without the jury present?

The jury was excused, after which the court heard government counsel state that he intended to ask the witness whether he had heard that, during 1960-1962, the Immigration and Naturalization Service had received numerous complaints that Berry, while in Venezuela, had taken more than $200,000 from employers, and whether he had heard that the files of the Immigration and Naturalization Service contained complaints from businessmen in three continents relative to Berry's illegal activities (R. 294-295). The trial judge considered the extent to which he would permit this line of cross-examination, and concluded that he would restrict it to questioning the witness "if he knows anything about Mr. Berry's application for citizenship in the United States and whether or not the application was withdrawn, and if he knows the reasons why" (R. 296). Defense counsel continued to object on the ground that the information regarding Berry's citizenship status was based upon hearsay (R. 297-298). The objection was overruled. On cross-examination of Cook and six other character witnesses, government counsel posed the questions regarding Berry's citizenship in the format approved by the trial judge beginning

with the phrase "Do you know." Of the seven, only three responded that they knew that petitioner had applied for citizenship, and none of these had known that he had subsequently withdrawn his application (R. 299, 302, 305, 308-309, 311, 313, 318).

Although counsel at trial raised no objection to the form of the question which the court permitted government counsel to pose to Berry's character witnesses, on appeal he claims that, pursuant to this Court's instructions in *Michelson* v. *United States*, 335 U.S. 469,[4] the mere use of the "Do you know" form of questioning constituted prejudicial error. This is a strained interpretation of the Court's decision. *Michelson* reviewed the scope of cross-examination of character witnesses, pointing out that once the defendant affirmatively initiates a character inquiry by reference to hearsay which a witness might have heard, the prosecution may test the sufficiency of the hearsay by asking, under court supervision, other questions regarding actual events "which would probably result in some comment among acquaintances if not injury to defendant's reputation." 335 U.S. at 481. This Court gave the trial judge wide discretion "accompanied by heavy responsibility * * * to protect the practice from any misuse." 335 U.S. at 480.

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[4] "Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquriy, 'Have you heard?' has general approval, and 'Do you know?' is not allowed." *Michelson* v. *United States*, 335 U.S. 469, 482.

In this case the trial judge fulfilled his responsibility by determining that the proposed area of inquiry referred to an actual event, and by reviewing, out of the presence of the jury, the extent to which he would allow the prosecution to pose questions on cross-examination of the character witnesses. The questions were originally framed by government counsel in the format of "have you heard?", but were amended upon the court's instructions. No complaint as to the form of question was raised although the defense excepted to the hearsay nature of the prosecutor's information. The limited function served by this testimony was explained to the jury in the court's closing instructions. In light of these circumstances, petitioners have not made a "clear showing of prejudicial abuse of discretion," *Michelson* v. *United States*, 335 U.S. at 480. As noted by the court of appeals (Pet. App. 8-9), the difference between the two forms of expression was not sufficiently great to warrant the exercise of an appellate court's supervisory power to reverse the conviction, especially since the form used "may well have been to [petitioner's] advantage" (*ibid.*) and his counsel did not object to it. *Kasper* v. *United States*, 225 F.2d 275, 279-280 (C.A. 9); *Saunders* v. *United States*, 192 F.2d 409, 411 (C.A.D.C.); see also *United States* v. *DeAlesandro*, 361 F.2d 694, 700 (C.A. 2), certiorari denied, 385 U.S. 842; *United States* v. *Alker*, 260 F.2d 135, 151 (C.A. 3), certiorari denied, 359 U.S. 906; *Malatkofski* v. *United States*, 179 F.2d 905, 912 (C.A. 1).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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